

**BEFORE THE UNITED STATES DEPARTMENT OF INTERIOR
MINERAL MANAGEMENT SERVICE**

**COMMENTS OF THE OCEAN RENEWABLE ENERGY COALITION (OREC)
ON MINERAL MANAGEMENT SERVICE'S PROPOSED LEASE OF
SUBMERGED LANDS FOR ALTERNATIVE ENERGY ACTIVITIES ON THE
OUTER CONTINENTAL SHELF**

The Ocean Renewable Energy Coalition (OREC), the national trade association for marine energy renewables, including wave, tidal, current, hydrokinetic, ocean thermal and offshore wind, submits these comments on the Mineral Management Service' Proposed Lease of Submerged Lands for the Alternative Energy Activities on the Outer Continental Shelf, 72 *Fed. Red.* 71154 (December 14, 2007). The lease is part of MMS' proposed interim proposal for allowing deployment of test and demonstration wind, wave, tidal and current facilities on the OCS.¹

These comments are organized as follows. Part I contains an Executive Summary of the comments. Part II offers our section-by-section analysis of the proposed lease.

I. EXECUTIVE SUMMARY

OREC appreciates MMS' continuing efforts to implement a program that will allow marine renewables developers to test facilities on the OCS. However, MMS' lease,

¹ OREC filed extensive comments on MMS' Interim Policy on January 11, 2008. Generally, OREC endorsed MMS' efforts to move ahead with a program that will allow for development of marine renewables on the OCS. However, OREC asked MMS to clarify certain aspects of the program, such as developers' ability to sell power during the test period or to build out successful projects. OREC also opposed that MMS' proposed rental fee as too costly.

as proposed does not give marine energy developers any incentive to avail themselves of the test program. Specifically, OREC has concerns about the following provisions:

Section 1 of the lease does not give incumbent developers any rights or preference to build out a successful test project to commercial scale – and indeed, expressly states that they *do not* have this right. As a result, it is unlikely that developers will be able to attract private capital to construct a test facility without some ability to later make the project commercial. In addition, a five year lease may prove too short – and MMS should act flexibly about renewing leases for subsequent terms where a developer can show progress.

Section 10 of the Lease requires developers to submit to MMS confidential or proprietary studies, data and test results. OREC objects strenuously to these requirements. Marine developers’ most valuable asset is their IP and disclosure of this information to MMS, even with protective measures in place, will severely compromise a developer’s competitive advantage. Moreover, as the frequent news reports about identity theft or stolen laptops with security information demonstrate, even the most highly secure systems are not impervious to penetration. Companies simply cannot risk submitting proprietary test data that might later intentionally or inadvertently disclosed.

Section 15 of the Lease requires payment of a \$300,000 surety bond which may prove onerous for many companies. MMS should consider alternatives to the surety bond such as a letter of credit or other evidence of creditworthiness.

Section 16 allows for assignment and transfer of leases. Generally, the ability to assign leases will give developers flexibility to merge or enter into joint ventures to move forward with a project. At the same time, allowing companies the unfettered ability to transfer projects can invite speculators to apply for leases with the sole intent of selling them off to the highest bidder. MMS should deter transfers in this type of situation.

Section 18 requires developers to remove facilities from the lease within a year of its expiration or surrender. OREC does not believe that removal is appropriate or cost effective in all situations and asks MMS should allow alternatives to full removal.

What follows is our section by section analysis of the proposed lease.

II. SECTION BY SECTION LEASE ANALYSIS

Section 1: *Rights of Lessee* This section grants lessees the rights to conduct the activities specified in Exhibit B. As relevant to wave and current power developers, these activities include constructing, installing, upgrading and maintaining buoys, turbines and other devices to measure waves, flow and power potential; accessing leased

area for site analysis, including geotechnical and feasibility studies; testing technology, installing transformers, generators, distribution and transmission lines and interconnection facilities and carrying out any other activities “necessary to establish the nature and extent of wave and/or current resources and establish whether the resource is sufficient for commercial production and distribution of electricity. *See also* Exhibit B. Section 1 expressly provides that the lease “confers no preferential right to acquire, developer or operate commercially any alternative energy project on the OCS.”

OREC Comments: As stated in our comments on the Interim Proposal, OREC believes that developers who site test or demonstration policies on the OCS should have at least a marginal, incumbent preference to expand a successful project. Following completion of the test term, MMS could open a site up for competition to satisfy any competitive requirements of Section 388 of the Energy Policy Act. However, the incumbent developer of a successful wave or current project that optimizes the energy potential of the site should have a substantial preference over any newcomer and should be permitted to operate the project pending issuance of a long term lease for commercial operation.

Requiring the developer of a successful project to remove the project to make way for an untested technology wastes resources and will delay development of marine renewables projects. In addition, a successful developer should not be required to “buy out” a potential competitor with a bonus bid or through an auction to retain a site, as might be the practice in the oil and gas industry. The marine renewables industry is still nascent, with most companies substantially under funded. MMS must adopt programs that minimize the costs associated with development of the first generation of marine

renewables projects. Requiring removal and denying incumbent preference increases the costs of entry – and will have the unfortunate consequence of deterring development of marine renewables on the OCS.

Section 2: Designation of Operator – Where there is more than one lessee, the lessee must designate an operator to act on behalf of all leasees and fulfill all of their obligations under the lease.

OREC Comments - Where two companies are sharing a lease, it is unlikely that they will agree to a single operator in all cases. Most companies will want to keep proprietary information confidential and may not want a shared operator to have access to information about their project which could be disclosed, even inadvertently, to a competitor. Where leasees share a lease, each should retain responsibility for compliance with the terms of the lease, and MMS should deal with each lessee separately.

Section 3: Reservations to Lessor Lessor reserves the authority to authorize other uses on the leased land that will not unreasonably interfere with activities authorized under this lease.

OREC Comments – OREC prefers that MMS grant leases for exclusive use, unless the lessee consents to other activities. However, should MMS decide to authorize other activities, it must provide adequate notice of the activities to existing leasees and offer them an opportunity to object to the proposed activities. In addition, where MMS authorizes other uses, it should prorate any rental fees paid by the lessee.

Section 4 – Effective Date and Lease Term – The lease term will expire five years from the effective date of the lease, unless the lessee requests an extension. The request

must demonstrate that the lessee reasonably needs more time to conduct the activities authorized under the terms of the lease. MMS has sole discretion to grant a written request for an extension.

OREC Comments – The MMS rules and the lease are not clear about whether a lease alone will authorize any necessary construction – or whether a lessee must also apply for other authorizations such as a CZMA certification or a Section 10 RHA permit from the Corps, which has authority over structures on the OCS under Section 4(f) of the OCSLA.² In addition, where a lessee seeks to run a transmission line to shore, it must comply with applicable state regulations – *e.g.*, state laws for leasing submerged lands as well as other state environmental laws which would apply to siting a transmission line on state submerged lands. If a lessee is required to receive other necessary authorizations prior to actually siting a project, a five year lease term will not suffice. OREC developers have reported processes of between eight months (at the low end) to three or four years to obtain authorizations from the Corps and various state agencies. Delays occur for a variety of reasons, such as agencies requiring more information, agency understaffing or seasonal cycles (for instance, if a lease is issued in mid-winter, a developer may need to wait until a warmer season to commence activities) or simply due

To address this problem, MMS should either clarify that once a lease is issued, no other authorizations are required for activities performed within the leased area.

Alternatively, MMS should modify the lease terms to provide that the five year term will not start to run until developers receive other authorizations necessary to site projects.

² Section 401 and 404 of the Clean Water Act extend up to three miles from shore and thus, would not apply to projects on the OCS which by definition, are more than three miles from shore.

MMS could include due diligence or best efforts clauses to ensure that developers make progress on obtaining other authorizations to avoid site banking problems.

Section 5- Statute and Regulations This section provides that the lease is subject to the OCSLA act and all other guidelines and directives issued under the Act. OREC has no inherent objection to this provision but again, seeks clarification on how MMS' interim lease program will be coordinated with FERC's licensing process.

Section 6 – Rentals Section 6 provides that rentals are due on the first day of each lease year. OREC has no objection to this provision, but hopes that MMS will reconsider assessing rental fees for test leases issued to nascent marine renewables developers.

Section 7 – Notice of Commencement of Activity The lessee must notify the lessor at least 72 hours prior to commencing installation of facilities. OREC has no objection to this request.

Section 8 – Project Plan – Section 9 provides that the lessee cannot conduct activities under the lease, except for Initial Survey Activities, until it has submitted an acceptable Plan. The Plan must include a description of technology to be utilized, surveys to be conducted, structural and project installation information, a description of safety prevention and environmental protection features, a description of how the facilities will be removed and any other information requested.

OREC Comments – OREC supports the proposal to allow Initial Surveys to commence before the project plan is submitted. Some of the initial surveys and studies will be important for preparing the plan itself and may be seasonally constrained, so starting studies as early as possible is important.

Until the industry gains more experience working with MMS, OREC asks that MMS make staff available to provide guidance on the appropriate level of detail and information that should be included in the Project Plan. In addition, MMS should stay flexible and allow developers to modify the plan as they go, depending upon the results and data generated through further studies and project operation.

Section 9 – Compliance The Lessee agrees to conduct all activities in the leased area in accordance with applicable rules. The Lessee also agrees that it will not carry out activities in a manner that could endanger operations under any other lease issued by MMS or other federal agencies, or could cause harm to marine life, create hazardous conditions or interfere with other uses of the leased area.

OREC Comments - Naturally, OREC's members intend to carry out activities under the lease in compliance with applicable law and with as little effect on the surrounding environment or other uses as feasible. At the same time, OREC believes that MMS must establish of clear and specific standards to help developers avoid confusion about their obligations and thus, facilitate their ability to comply.

Section 10 and 11 – Progress Reports and Confidentiality - Section 10 of the lease provides that a lessee must submit a quarterly progress report which must include, among other things, a copy of all studies, surveys and test reports compiled or completed during the given period. MMS also has the right to request raw data and computations models. Section 11 of the lease provides that MMS will keep all information confidential to the extent permitted by applicable law, in particular, the Freedom of Information Act. Information would be kept confidential for a period of no less than 60 months.

OREC Comments – OREC absolutely objects to any lease provision that requires disclosure of confidential and propriety information. While OREC has no problem with developers describing their progress in a general manner that does not compromise proprietary data, OREC cannot agree to a requirement that would force developers to submit detailed data or studies. At a time where the marine renewables industry is in its nascent stages, and where companies are vying for private capital, disclosure of confidential study results or information about a project’s technology could destroy a company’s competitive edge and deprive it of its most valuable asset: its intellectual property.

MMS has not offered any justification for why MMS requires access to studies and other proprietary data to carry out an alterative energy program on the OCS, particularly a program where a developer has no incumbent right to build out a successful test site. Whereas submission of study results and data *might* arguably be justified in a situation where a developer had the ability to apply for a long term commercial lease following the conclusion of a test lease, the MMS program specifically denies incumbent developers any preference for a long term lease. Thus, MMS asks developers to submit and risk public disclosure of highly confidential information in exchange fornothing!

While OREC appreciates MMS’ attempts to provide for safeguards of proprietary information, these measures are utterly inadequate. Consider the frequency of news reports about unauthorized theft of personal data such as bank account numbers or social security numbers which are subject to stringent data retention requirements. Here, it is unlikely that the MMS system for safeguarding project data will match the stringency of

programs used by banks or personnel offices – and even those programs are easily penetrated.

OREC recognizes that sharing data, particularly information on environmental effects will help move the industry forward. At the same time, most marine developers are self-funded entities that are already making substantial financial sacrifices to bring to fruition a technology that will benefit the public at large. If developers' studies were publicly funded, then asking them to share substantive information about their project impacts might be reasonable. But here, where developers receive no benefit – no funding for projects and no right to build out a successful site – requiring disclosure of sensitive proprietary data exacts far too high a price for a five year lease. Ultimately, MMS' proposal will drive U.S. companies overseas to test facilities in Europe.

Section 12 – Inspections Lessees must allow federal inspectors to the site and provide documents related to public health and environmental protection.

OREC Response - OREC does not have any objection to federal inspection, provided that sufficient protections are in place to keep confidential any proprietary information that may emerge from the inspections.

Section 13 – Violations, Suspensions and Cancellations Section 13 provides that if a lessee violates any provision of the lease, MMS may, after giving written notice to the lessee, order the lessee to cease and desist from violations or suspend operation. The lessee will have 30 days to remedy the violations; if they are not remedies, the lessor can cancel the lease. MMS can also cancel or suspend a lease to comply with a judicial order, respond to serious threats of imminent harm to human life or natural or archeological resources and to respond to national security requirements.

OREC Response- OREC asks MMS to clarify more precisely, what types of violations or threats may trigger suspension or cancellation. Clear regulations will help developers avoid confusion and facilitate their ability to comply with the lease.

Section 14- Indemnification provisions – OREC has no comments on the indemnification provisions.

Section 15- Security The lessee must maintain a surety bond in the amount of \$300,000 and furnish additional security as may be required by the lessor.

OREC Response – A surety bond is an onerous requirement for many fledgling marine renewables company. MMS should consider alternatives to the surety bond such as a letter of credit or other evidence of sufficient creditworthiness to accomplish decommissioning.

Section 16 – Assignment or Transfer The lessee may not transfer the lease except with prior written approval from MMS. MMS has sole discretion to deny transfer or approval.

OREC Response- MMS must develop standards for the circumstances in which it will approve a transfer of a lease. Generally, OREC endorses a system where developers can assign or transfer their lease rights. Many times, a marine renewable company may run out of money and is acquired by or merges with another entity. In this situation, the successor company should have the ability to finish out the term of the lease.

At the same time, OREC is concerned that an unfettered transfer system, without oversight, may encourage speculators and non-bonafide developers to obtain leases and subsequently transfer them at an added cost to other companies. This type of system does not promote the public interest and would add to the cost of marine energy development by giving rise to a system of “middlemen” who would acquire and re-sell lease rights.

Section 17 – Surrender of Lease/Section 18 – Removal of Property and Restoration

of Lease- Under Section 17, a lessee can surrender a lease provided that it removes property from the lease. Section 18 states that a lessee must remove all devices and structures from the leased area and restore the leased area to its original condition within 1 year after a lease is cancelled, expires or is relinquished.

OREC Comments- A lease should allow other options as an alternative to complete removal. In some instances, (such as removal of pilings), complete removal is impractical. And in some cases, removal of structures could have a more adverse impact than leaving them in to serve as an artificial reef. We note that the Final Programmatic EIS considers alternative approaches to complete removal in Section 3.5.5.

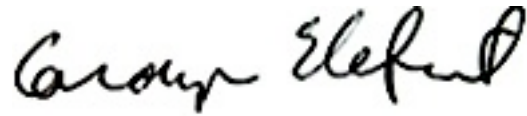
In addition, as we have noted earlier, OREC asks MMS to consider allowing developers to build out a site following a successful demonstration. In a case where build out will take place, project removal is inefficient; it makes no sense to require a developer to remove a project and then reinstall it if it decides to pursue a commercial project. Also, even if a developer decides to vacate a site after a lease ends, a different company may decide to re-use some of the structures, platforms or transmission lines already in place. Decommissioning does not make sense where a second developer can reach an agreement with its predecessor to acquire and re-use some of the facilities installed under the first lease.

IV. CONCLUSION

OREC appreciates the time, effort and resources that MMS has devoted to the process of implementing its new authority under Section 388 of the Energy Policy Act of 2005 to issue leases for alternative energy on the OCS. However, MMS must adopt the

changes proposed by OREC in these comments to give marine renewables developers sufficient incentive to utilize the interim test program

Respectfully submitted,

A handwritten signature in black ink that reads "Carolyn Elefant". The signature is written in a cursive, flowing style.

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